Nos. 90-711 and 90-712

In The

Supreme Court of the United States

October Term, 1991

LAWRENCE C. PRESLEY, individually and on behalf of others similarly situated,

Appellant,

vs.

ETOWAH COUNTY COMMISSION,

Appellee.

ED PETER MACK and NATHANIAL GOSHA, III, individually and on behalf of others similarly situated,

Appellants,

vs.

RUSSELL COUNTY COMMISSION,

Appellee.

On Appeal From The United States District Court For The Middle District Of Alabama

BRIEF OF THE APPELLEE RUSSELL COUNTY COMMISSION

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QUESTION PRESENTED

WHETHER LOCAL LEGISLATION WHICH MERELY SHIFTS MINISTERIAL ROAD DUTIES FROM INDIVIDUAL COUNTY COMMISSIONERS ELECTED AT LARGE TO A ROAD ENGINEER RESPONSIBLE TO THE COUNTY COMMISSION AS A WHOLE IS SUBJECT TO PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT?

PARTIES IN COURT BELOW

The parties in the court below at the time of the judgment were plaintiffs Ed Peter Mack, Nathaniel Gosha, III, Lawrence C. Presley, and defendants Russell County Commission and Etowah County Commission.

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The opinion of the district court is unreported. The opinion of the district court is reproduced beginning at JS A-1.[1] The order denying the motion to alter or amend the judgment is reproduced beginning at JS A-42.

JURISDICTION

The district court denied the requested injunction on 1 August 1990 and denied the motion to alter or amend the judgment on 21 August 1990. The Appellants filed their respective Jurisdictional Statements in this Court on 16 October 1990. This appeal is taken under 28 U.S.C. § 1253.

STATUTORY PROVISIONS

The Fifteenth Amendment to the Constitution, 42 U.S.C. 1973, and 1973c[2] are set out in full in the Appendix to this brief.

STATEMENT OF THE CASE

Appellee totally rejects Appellants' Statement of the Case. Appellants are traveling on a totally false assumption

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[1] Unless otherwise noted, references to "JS" may be found in the Appendix to *Appellants'* Jurisdictional Statement at the cited page.

[2] 42 U.S.C. 1973c is commonly known as "Section 5."

that prior to 1979, each commissioner had complete control of a virtually autonomous district, including a portion of the budget.

Prior to 1979, the road department of Russell County operated under a district or semi-district system. In 1979 the Russell County Commission consisted of five commission members. Two commissioners whose districts were contained within the city limits of Phenix City, Alabama had virtually nothing to do with *direct* supervision of road operations in the county since the roads and streets in their district were maintained by the Phenix City Road Department. The three commissioners whose districts lay outside of Phenix City were personally involved in the day-to-day management and direct supervisory aspects of the county road work in their district.[3] (*See* A-14, Deposition of John Belk, p. 10). The districts were approximately the same size and contained approximately the same miles of rural roads. (*See* A-14, Deposition of John W. Belk, page 20.) All county road funds were budgeted for the county as a whole and were never divided between the districts. (*See* A-14, Deposition of

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[3] The streets and roads within the Phenix City, Alabama municipal limits are maintained from separate city and state funds under control of the municipality. In fact, 20% of Russell County's share of the State gasoline tax by general and local law goes to the municipalities. (Exhibit 3 to this defendant's Motion for Summary Judgment). Counties may, with consent of the city government, work on city streets. *Alabama Code*, 1975, § 23-1-86 (Michie 1986 Repl. Vol.). Since the case was submitted to the three-judge lower court on depositions and exhibits, there is no formal record. References herein to exhibits and depositions are from those submitted to the lower court.

John Belk, pp. 8, 9) The three shops were included in a single road budget always under the control of the entire county commission. (*See Id.*)

During the latter part of 1978 and early 1979, a Russell County grand jury conducted an investigation involving misuse of county equipment and personnel. As a result, one of the commissioners was indicted by the grand jury. The same grand jury recommended that the county adopt what is commonly known as the "Unit System". (*See* A-14, Deposition of John W. Belk, page 8). Under the Unit System, the county road department is operated, without regard to district lines, by the county engineer, a professional appointed by and responsible to the county commission. *See Alabama Code*, 1975, § 11-6-1 (Michie 1986 Repl. Vol.).The duties of the county engineer are specified by state law (§ 11-6-3 of the *Code*).[4] The Unit system is the system recommended by the Alabama's State Highway Department and other authorities. (*See* A-16, Deposition of Charles Adams, pp. 13, 14).[5]

Following the grand jury's investigation, indictment and recommendation, a member of Russell County's legislative delegation, Rep. Charles Adams, met with the

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[4] The specifications for county road engineer have been set out by statute in Alabama since 1939. *See Alabama Code*, Title 12, § 69 (Michie 1940).

[5] A copy of the pertinent portion of Auburn University Professor Lansford C. Bell's recommendation was attached as a part of Exhibit 1 to Russell County's response to the Justice Department in the Court below. The unit system or a modified version of the unit system is currently operating in 45 of Alabama's 67 counties.

county commission to encourage adoption of the Unit System for operating the county road department. During a meeting on May 18, 1979, the county commission passed a resolution reorganizing the road department under the Unit System "effective immediately". (Quoted by lower court's opinion. *See* Appellant's JS A-3).

Following the meeting of the county commission, Rep. Adams introduced House Bill 977 into the Alabama Legislature, which later became Act No. 79-652. (*See* A-4) This bill was introduced by Rep. Adams to prevent the county commission from deciding at a later date to reverse its resolution of May 18, 1979. (*See* A-16, page 9 of Deposition of Charles Adams).

Approximately seven years later, as a result of a consent decree entered March 17, 1986, in *Sumbry v. Russell County*, CV-84-T-1386-E, the county was redistricted into seven commission districts, three of which have a predominantly black population. Although past discrimination, based on unlawful dilution of black voting strength was alleged, no such finding was entered. Prior to *Sumbry*, the five commissioners, while residing in individual districts, were elected from the county "at large". *Sumbry* divided the county into seven districts and each commissioner is now elected by district. Two of the commissioners, Mack and Gosha, (Appellants in this case) are black and were elected in 1986,[6] seven years after the contested legislation was enacted.

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[6] Mack and Gosha were elected to Districts 4 and 5 respectively. District 4 has 1.3 total miles of county-maintained roads or .2% ; District 5 has 73.92 miles of county-maintained roads or 13.8%. (*See* A-11, formerly Exhibit 3.B. to Defendants' Motion for Summary Judgment).

Appellants instituted an action in the United States Federal District Court, Middle District of Alabama, on May 5, 1989 alleging, *inter alia*, a violation of their voting rights pursuant to Section 2 of the Voting Rights Act of 1965. After amending their complaint twice (*Joint Appendix* pp. 15, 31), the Appellants, under the authority of 28 U.S.C. § 2284 (West 1978 & 1990 Supp.) requested a three-judge court to consider whether the Appellee's legislation converting the county to the unit road system was subject to the preclearance requirements of the Voting Rights Act, found in Section 5. Appellants' motion was granted and on August 1, 1990 the three-judge panel issued an order which found Russell County's 1979 enactments to be exempt from Section 5's preclearance requirements. (Before JOHNSON, Circuit Judge, HOBBS, Chief District Judge, and THOMPSON, District Judge. J. THOMPSON dissented.) It is this order which the Appellants have chosen to challenge before this Court. (The three-judge court's order is set out in full in *Appellants'* Jurisdictional Statement Appendix, beginning at A-1). Their appeal was docketed on October 26, 1990 and probable jurisdiction was noted on May 13, 1991.

SUMMARY OF ARGUMENT

The Court is called upon today to, once again, interpret the scope of the preclearance provisions, commonly known as § 5, of the Voting Rights Act of 1965. This section provides for federal preclearance of "changes" in "voting qualifications or prerequisites to voting, or

standards, practices, or procedures with respect to voting" not in effect on November 1, 1964. The purposes behind the Voting Rights Act, as well as its subsequent accomplishments, are certainly laudable. However, this Court should affirm the lower court's ruling that Russell County's conversion to the unitary road system is exempt from preclearance and that the application of § 5 is not without "limited compass."[7]

The Appellants are challenging Appellee Russell County Commission's 1979 legislative enactments which converted the county's road system from a district or semi-district system to a unitary system. This legislation shifted responsibility for day-to-day supervision of road authority in the rural districts from individual commissioners once elected at-large to a county road engineer appointed by the county commission as a whole.

The three-judge court below properly recognized that its role in assessing Russell County's 1979 legislation was to look for "potential for discrimination", the triggering mechanism of § 5. The court found that this local legislation, by which minor government powers are reallocated effecting no change in constituency, falls outside the purview of § 5.

The lower court's holding is clearly justified by the reasoning *implicit* in several Supreme Court cases and

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[7] This term is taken from Justice Harlan's concurrence and dissent in *Perkins v. Matthews*, 400 U.S. 379, 398 (1966).

explicit in several district court cases considering the "coverage" issue. This reasoning, termed by the Appellees a "change in constituency" analysis, contends that where minor powers are merely shuffled among government officials who are responsible to the same electorate or constituency, there simply is no potential for discrimination. This case can be contrasted with the "normal" § 5 case where the proposed change dramatically effects a shift in constituency, i.e., a switch from district elections to at-large elections.

Moreover, the district court's ruling is clearly correct given Alabama's law characterizing the road duties in question as being purely ministerial. Since the Russell County Commission held general supervisory authority over the county road operations both before and after 1979, only shifting the delegation of routine ministerial duties, there really was no change in terms of the Voting Rights Act.

Additionally, the Alabama Middle District Court's ruling is supported by the statutory construction of § 5 and the legislative intent behind the Voting Rights Act. The impetus behind the Voting Rights Act was the elimination of obstacles to blacks exercising their right to vote, i.e., poll tests, and the augmentation of black voter registration. The act in general, and § 5 specifically, was intended to prevent such states from reimposing obstacles to black voter registration and was not intended to intrude upon the day-to-day operation of local governments.

Finally, in considering the reality behind the implementation of Russell County's unitary system in 1979, it

is significant that the plan advocated by the Appellants, equal distribution of road funds and resources between the districts regardless of need – though this has never been the law or practice in Russell County – would actually harm many black constituents. It is apparent that the Appellant's main complaint is simply a lack of discretionary funding to spend in their districts.

WHEREFORE, PREMISES CONSIDERED, the Appellee Russell County Commission requests that this Court affirm the lower court's ruling and hold that Russell County's 1979 legislation installing the unitary road system is exempt from the Voting Rights Act's preclearance requirements.

ARGUMENT

LOCAL LEGISLATION WHICH MERELY SHIFTS MINISTERIAL ROAD DUTIES FROM INDIVIDUAL COUNTY COMMISSIONERS ELECTED AT-LARGE TO A ROAD ENGINEER RESPONSIBLE TO THE COUNTY COMMISSION AS A WHOLE DOES NOT CONSTITUTE A "CHANGE" WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT AND THEREFORE DOES NOT REQUIRE PRECLEARANCE.

A. The three-judge court correctly found that minor reallocations of local governmental powers among elected officials where there is no change in constituencies fall outside the purview of Section 5's preclearance requirements because there exists no potential for discrimination.

The three-judge court below recognized that its duty was simply to determine whether the Russell County,

Alabama's 1979 road and bridge enactments constituted a change under § 5 of the Voting Rights Act of 1965[8] creating a "potential for discrimination."[9] JS A-8. After fully considering the facts before them and applying the relevant law, Alabama's Middle District concluded that a reallocation of local governmental authority which does not effect a "significant relative change in the powers exercised by government officials" and which does not change the constituencies to which the officials are responsible, is not a "change" within the meaning of § 5 of the Voting Rights Act. JS A-13, 14.

1. The District Court's ruling is not inconsistent with prior Supreme Court cases defining the scope of § 5 coverage.

While never having addressed the specific issue of whether § 5 would require preclearance of routine reallocations of ministerial governmental duties which result in no change in constituency, this Court has certainly left the door open for the formulation of a "change in constituency limitation" in § 5 coverage. In 1984, the factual backdrop of *McCain v. Lybrand*, 465 U.S. 236, set the stage for the Court to determine whether § 5 applied to minor

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[8] Section 5 has been encoded at 42 U.S.C. § 1973c, hereafter "§ 5". Section 5 is reprinted in full at A-3.

[9] Appellants' contention that the three-judge panel below exceeded its scope of review looking past the threshold coverage inquiry of "potential for discrimination" into substantive considerations is insupportable. Even a cursory review of the lower decision indicates that the court did not deviate from accepted Section 5 modes of analysis.

reallocations of power, including jurisdiction over roads, and the impact of a change in constituencies. *Id.* at 239. Unfortunately, because the contested South Carolina act put into force more substantial changes (conceded to come within § 5's coverage), and the main issue focused upon an interpretation of previous Justice Department preclearance approval, the Court never reached the minor reallocations of power enacted by the South Carolina legislation nor the impact of a change in constituency. *See Id.* at 250 n.17. Such questions were left by this Court, somewhat prophetically, for "future proceedings." *Id.* at 250 n.17.[10]

Whereas this honorable Court may have never used the term "change in constituencies", many of this Court's § 5 rulings appear to be, in fact, rooted in a "change in constituency" analysis. For example, when a suspect political subdivision converts from district representation to at-large representation, the "change" creates a potential for discrimination because "[v]oters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole." *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969). Justice Stewart conducted a similar analysis in *Georgia v. United States*, 411 U.S. 526, 534 (1973), where he framed the coverage issue to be "whether such changes [single member to multimember districts] have the potential for diluting the value of the Negro vote." To state the obvious: the potential for vote dilution arises when there

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[10] The Court's meaning was of course that the questions listed would be addressed by the district court upon remand.

is a change in constituencies. Clearly, Chief Justice Warren and Justice Stewart engaged in what the Appellee has termed, for want of a better expression, a "change in constituency" analysis.

Similarly, reapportionment and annexation schemes fall within § 5 because their very purpose is to change the makeup of a constituency, thereby creating a potential for minority voting strength dilution. *See McDaniel v. Sanchez*, 452 U.S. 130, 134 (1981) (reapportionment); and *Perkins v. Matthews*, 400 U.S. 379, 388 (1971) (annexation); *accord*, *Pleasant Grove v. United States*, 479 U.S. 462, 467 (1987), and *Richmond v. United States*, 422 U.S. 358, 362 (1975).

The remaining § 5 coverage cases decided by this Court have addressed legislation of the nature which discourages minority candidates from seeking elective office, thus making the minority's vote ineffective, *see*, e.g., *Dougherty County Board of Education v. White*, 439 U.S. 32, 37 (1978) (rule requiring Board of Education employees seeking elective office to take unpaid leave of absence during campaign periods), and *Hadnott v. Amos*, 394 U.S. 358, 362-65 (1969) (practice requiring minority candidates to undergo obstacles not required for white candidates). The Alabama District Court specifically found that this line of cases was "basically inapposite" and factually distinguishable from the Appellants' situation in the present case. *See* JS A-15, n.14.

2. The District Court's ruling is consistent with previous district court decisions which emphasize the presence of a change in constituencies as being evidence of potential for discrimination.

Following this Court's lead in conducting what was, in essence, a "change of constituency" analysis, *see supra*, the lower courts coined the phrase "different constituencies" or "changed . . . constituency", finding the analysis quite helpful in resolving § 5 coverage close calls. Apparently, the first district court case to explicitly rely upon a "change in constituency" analysis to define § 5's scope was *Horry County v. United States*, 449 F.Supp. 990, 995 (D.C.D.C. 1978). The court explained that,

> An alternate reason for subjecting the new method of selecting the Horry County governing body to Section 5 preclearance is that the change involved reallocates governmental powers among elected officials voted upon by different constituencies. Such changes necessarily affect the voting rights of the citizens of Horry County, and must be subjected to Section 5 requirements. *Cf. Perkins v. Matthews, supra; Allen v. State Board of Elections, supra.*

Id. Note that the three-judge district court did not see themselves as formulating a "novel" § 5 coverage theory; rather, the court was simply relying upon the Supreme Court's reasoning in *Perkins* and *Allen, supra. See Id.*

The "different constituency" paradigm was elevated from "an *alternate* reason for subjecting . . . [a change] . . . to Section 5 preclearance", *Id.* (emphasis added), to "*the most relevant attribute* of the challenged act" in *Hardy v. Wallace*, 603 F.Supp. 174, 178 (N.D. Ala.

1985) (emphasis added). In *Hardy*, the change in constituencies and resultant discriminatory potential created by Alabama's Act No. 507 in 1983 is quite illustrative of why the "change in constituency" analysis is so particularly effective in assessing § 5 coverage. In 1975, the Alabama legislature created the Greene County Racing Commission whose members were to be appointed by the all white legislative delegation representing Greene County at the time. *Id.* at 175. The powers of the commission were significant since the county racetrack would become the county's largest employer and would be responsible for 63% of the county's tax revenue. *Id.* at 176. In 1983, when it became clear that a reapportionment plan gave blacks the power to elect black candidates to the Greene County legislative delegation,[11] the Alabama legislature responded by transferring the power to appoint racing commission members *from* the Greene County legislative delegation *to* the Governor of Alabama, George Wallace, a white male. The "potential" for discrimination existed because the appointive powers and its corresponding influence were taken away from the legislative delegation responsible to the majority black Greene County voters and bestowed upon a governor who was responsible to the state-wide voters, 99% exclusive of Greene County voters and majority white in makeup. *Id.* at 176, 179.

The most recent district court decision overtly relying on a "change of constituency" analysis is *Robinson v.*

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[11] Compare the timing of this legislation with Russell County's 1979 reallocation of day-to-day road and bridge authority which occurred *seven years* before appellants Mack and Gosha or any other black was elected to the Russell County Commission.

Alabama State Board of Education, 652 F.Supp. 484 (M.D. Ala. 1987) (three-judge panel). The district court was called upon to analyze Perry County's shift in Marion city school authority *from* a county board of education elected county-wide by a black majority *to* a city board of education appointed by Marion City Council members who were, in turn, elected by the city's white majority. *Id.* at 485. The panel's order, drafted by Judge Thompson[12], extended § 5 coverage "[f]irst," because "the resolution changed the *constituency* that selected those who supervised and controlled public schools within the city." *Id.* at 486 (emphasis in original). The court continued to explain that "[p]rior to the resolution, *county voters* elected the board members who controlled public schools in the city; under the resolution, however, the *city council* selected the board members who controlled city schools." *Id.* (emphasis in original).

The common denominator in *Horry*, *Hardy* and *Robinson*,[13] all cases where § 5 coverage was extended, is a potential for discrimination which arises out of a change in constituencies whereby minority voting strength can be either overtly or covertly diluted. This "relevant attribute"[14] is conspicuously absent from the Russell County legislation in the case at bar. Before 1964 and up until

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[12] Judge Thompson, ironically, was a dissenter in the lower court's ruling in the case at bar.

[13] Arguably, *County Council of Sumter County, South Carolina v. United States*, 555 F.Supp. 694 (D.C.D.C. 1983) relies on a change in constituency analysis for its holding also but not as explicitly as *Horry*, *Hardy*, and *Robinson*.

[14] This term is taken from *Hardy v. Wallace*, *supra*, at 178.

1979, the county commission as a whole held general supervisory authority over the county road system and delegated direct or day-to-day supervision of the road system to three rural district county commissioners *elected at large* and responsible to the *county as a whole*. The 1979 enactments maintained the vestment of general supervisory authority in the Russell County Commission, but delegated the direct or day-to-day authority over county road operations to a professional county engineer appointed by, and under the authority of the same county commission. The three judge panel put it most succinctly when it found that "[b]oth before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county." JS A-16.

While *Horry*, *Hardy* and *Robinson* all use the constituency analysis to *extend* § 5's coverage, Judge Vance implicitly recognized in *Hardy* that the same reasoning could be used to *limit* § 5 coverage when he, in dictum, opined:

> The ordinary or routine legislative modification of the duties or authority of elected officials or changes by law or ordinance in the makeup, authority or means of selection of the vast majority of local appointed boards, commissions and agencies probably are beyond the reach of section 5, even given its broadest interpretation.

Hardy at 178, 179. The instant lower court in its wisdom recognized the Russell County scenario as the vehicle in which Judge Vance's cautionary dictum in *Hardy* would ripen into a ruling.

3. The District Court's ruling is consistent with prior positions held by the Justice Department emphasizing change in constituencies as indicative of potential for discrimination.

While the Justice Department has decided to support the Appellants in the instant case, their position generally upon reallocation of authority and the impact of a change in constituency is far from settled. This conclusion is evident not only from the Department's failure to promulgate applicable regulations on the subject, *see* JS A-15, but also from its position in earlier cases which is contrary to its stand today. As recently as 1985, the United States Attorney General wrote the Alabama Attorney General concerning the *Hardy* legislation, described *supra*. The Justice Department first objected, then withdrew its objection to the *Hardy* legislation stating, "[i]t is certainly not the case that every reallocation of governmental power is covered by Section 5."[15] *See* Appendix B to *Hardy v. Wallace*, 603 F.Supp. at 181. While the Justice Department may claim that its position in *Hardy* favoring such a § 5 limitation is merely a recent aberration, the truth is that as early as 1969 the Department embraced the position that, "Section 5 applies to laws [that] substantially change the constituency of certain officials . . . . " *Perkins v. Matthews*, 400 U.S. at 391, n.10, quoting the Justice Department's *amicus* brief in *Fairley v. Patterson*, 393 U.S. 544 (1969). From any fair reading of the Justice

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[15] It appears that, to some extent, it was *Hardy v. Wallace* that led Alabama's Attorney General to decide that it was unnecessary to submit Russell County's legislation for federal preclearance. (Stipulated Testimony of Lynda K. Oswald, A-10). The unit system or modified unit system is currently operating in 45 of Alabama's 67 counties.

Department's position in both *Hardy* and *Fairley*, one is caused to wonder why the Department did not choose to write its *amicus* brief in favor of Appellee.

B. The County Commission by state law has always held general supervisory authority over the county road system and therefore, the delegation of "ministerial" road and bridge duties to an appointed county road engineer does not effect a "change" within the meaning of Section 5.

While the Alabama District Court focused on the linkage between changes in constituency and potential for discrimination, the Appellee has, throughout the proceedings, asserted a subtly different additional ground for the denial of § 5 coverage in this case: given Alabama's history of investing the county commission with ultimate or general supervisory authority over county road operations, the 1979 Russell County enactments simply did not effect a "change" within the meaning of § 5. A comparison with the ruling of the district court is helpful. The district court found, in terms of constituency, "[b]oth before and after the 1979 change, the official responsible for road operations in each district was elected by, or responsible to, all the voters of the county. Thus, there was no *change* in potential for discrimination against minority voters." JS A-16 (emphasis in original). The Appellee's proffered alternative ground is similar. Both before and after 1979, the county commission was clothed with the ultimate authority over county road and bridge systems. The fact that in 1979 ministerial or administrative road duties once delegated to rural district commissioners were rerouted to a county employee, the county engineer, is irrelevant in terms of § 5.

1. Under Alabama law the county commission acting as a unit has always been vested with general supervisory authority over the county's road system with the power to delegate administrative or ministerial duties to subordinates.

The appellants have attempted to convince the Court that prior to 1979 Russell County commissioners were autonomous road bosses who reigned sovereignly over their road district "fiefdoms". While this has never been the *practice* in Russell County or anywhere in Alabama; more significantly, it has never been the *law* in Alabama.[16] [17] Although admittedly the rural district commissioners exercised direct supervision[18] over his residency district's road maintenance, the county commission has always been entrusted with "general superintendence of public roads and bridges." *See Court of Commissioners of Pike County v. Johnson*, 229 Ala. 417, 419, 157 So. 481

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[16] The relevant sections of Alabama's code which describe the road and bridge authority of the county commission and what authority, duties, or functions may be delegated to a county road engineer or supervisor are set out in Appellee's appendix. *See* A-5, *Alabama Code*, 1975, § 23-1-80 (Michie 1986 Repl. Vol.) and A-8, *Alabama Code*, 1975, § 11-6-3 (Michie 1989 Repl. Vol.)

[17] In other contexts, this Court has looked to state law to determine the authority and function of local officials, *see*, e.g., *St. Louis v. Praprotnick*, 485 U.S. 112, 124 (1988) (Section 1983).

[18] Appellee employs the term "direct supervision" to mean day-to-day responsibility for completion of tasks and overseeing of workers as opposed to "general supervision" which denotes a responsibility for the formulation of long range objectives and major budget allocations.

(1934). Any duty or power held by the individual district commissioner was *"administrative* in character" and would be *"subordinate to,* in co-operation with, and in aid of this court [of commissioners], which is still vested with general jurisdiction and supervision. . . . " *Id.* at 420 (emphasis added). The state's supreme court in *Court of Commissioners* unequivocally rejected the notion of autonomous district commissioners.

> . . . [T]here was no intention to transfer these governmental powers from the governing body of the county and vest them in the commissioner of each district. Such construction would destroy the unity of county government, and set up several rival government units of one man each, which, with undefined powers, would lead to great confusion.

Id. at 419. Clearly, no individual commissioner wielded the kind of autonomy over road and bridge matters, even within his residency district, that is suggested by Appellants.

Further, the creation of the post of county road engineer who would be responsible for direct supervision of road construction and maintenance took nothing away from the county commission in terms of road and bridge authority. In *Thompson v. Chilton County,* 236 Ala. 142, 181 So.701 (1938), Alabama's Supreme Court interpreted a statute apparently very similar to the 1979 Russell County legislation at issue. The *Thompson* opinion described the limitations of the county road supervisor's authority (precursor to the county road engineer) in terms virtually identical to *Court of Commissioner's*

description of an individual commissioner's road authority limitations, supra.

> To be sure the Road Supervisor is charged with the duty of supervising the construction, maintenance and repairing the public roads in said county, but this does not mean that he displaces, in this respect, the Court of County Commissioners. . . . This supervisor is required to be a civil engineer, and his duties and authority in no wise conflict with the general powers of the court [of commissioners]. He is in immediate charge of the construction, maintenance and repair of the roads, but his duties are *purely ministerial*, and *subordinate to* the Court of County Commissioners.

Thompson at 145 (emphasis added).

If the pre-1979 district commissioner exercised only "administrative" road duties which were "subordinate to" the county commission's road superintendence and the post-1979 county engineer can only exercise "purely ministerial" functions "subordinate to" county commission road authority, there was no "change" which could trigger preclearance under § 5. The county commission as a whole as well as each individual commissioner maintained the *same* general supervisory superintendence powers before 1979 as they did after 1979. There simply was no change in the substantive powers held by the commission.

2. The delegation of administrative or ministerial duties comes within the "administrative or ministerial exception" implicit in section 5 coverage decisions.

Although neither this Court nor any district court has explicitly relied upon an "administrative or ministerial exception" to limit the coverage of § 5, the framework has been laid for the formulation of such an exception. In *McCain v. Lybrand*,[19] 465 U.S. at 239, this Court considered the description of a county commission's powers as "administrative and ministerial" significant enough to note the description within its opinion. The Court never was presented with the opportunity to comment upon the impact such a designation might have on § 5 coverage because of the procedural posture of the case.[20] In *NAACP v. Hampton County Election Comm.*, 470 U.S. 166, 175 (1985), this Court extended § 5 coverage to legislation creating a two week filing period for a school district election to be held six months later. The lower court found that preclearance was unnecessary because "the scheduling of the election and the filing period were *ministerial* acts necessary to accomplish the statute's purpose." *Id.* at 174 (internal quotation marks omitted) (emphasis added). Interestingly, this Court, in striking down the lower decision, did *not* hold that there was no

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[19] *McCain* is discussed in a slightly different context *supra*, in part A.

[20] Besides the fact that the contested legislation in *McCain* enacted numerous "changes" in voting practices conceded to fall within the ambit of Section 5, *See McCain* at 239-240, 250 n.18, the primary issue before the court involved the interpretation of the Justice Department's approval of an earlier submission. *Id.* at 239.

"ministerial exception" – though the opportunity to do so was clearly before the court. Rather, the Court rejected the lower court's *characterization* of the acts as ministerial in light of the Voting Rights Act's objectives. *Id.* at 175.[21]

Similarly, in *Robinson v. Alabama State Board of Education, supra,* 652 F.Supp. at 486, the three-judge federal court from Alabama addressed a "change" in city school authority which the defendants characterized as merely "administrative" in nature. Again, the door was open for the court to rule that there simply was no "administrative exception" within § 5. The *Robinson* court, mimicking *NAACP,* chose not to do so; but instead, disagreed "with the defendants' characterization." *Id.* It is certainly not unreasonable to conclude from the *NAACP* and *Robinson* holdings, that in the right factual context, an act which can be *fairly characterized* as ministerial or administrative *may not* require preclearance under § 5.

Therefore, in the case at bar, where the challenged acts can be fairly characterized as "ministerial" or "administrative"[22] , the right fact situation is before the Court to explicitly recognize an exception that has to this point remained implicit. This Court should hold that the

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[21] The Court did rule that "minor alterations" in voting practices were not exempt from Section 5. *NAACP* at 176. Appellee's reading of the ruling in *NAACP* is justified on the ground that while the terms "minor" and "ministerial" are similar, they are not synonymous.

[22] Appellee would go so far as to assert that the designation of the road authority in question has been *conclusively* characterized as "ministerial" or "administrative" by the Alabama Supreme Court cases cited supra.

daily supervisory responsibility over a county's road maintenance program is clearly ministerial or administrative in nature and therefore should be excluded from the "potential severity"[23] of § 5 preclearance burdens.

C. The Voting Rights Act was "aimed" at voter registration and was never intended to introduce the heavy hand of federal scrutiny into routine local enactments which have no apparent nor real impact upon minority voting rights.

On August 6, 1965, the legislation commonly known as The Voting Rights Act went into effect. This legislation, passed by Congress pursuant to § 2 of the Fifteenth Amendment to the United States Constitution[24] mandated that,

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1793b(f) (2) of this title.

42 U.S.C. § 1973. The task of this Court today is to interpret the meaning and intent behind one of the many enforcement provisions of the Voting Rights Act, § 5, the

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[23] This term is taken from *Morris v. Gressette*, 432 U.S. 491, 504 (1977).

[24] The text of the 15th Amendment is set out, in full, at A-1.

preclearance provision. This section mandates preclearance or prior approval to be sought and obtained from the United States Attorney General or the Federal District Court of the District of Columbia "[w]henever a [suspect] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . . " 42 U.S.C. § 1973c.

While it is one thing to convey to Congress an intent to give the Voting Rights Act "the broadest possible scope"[25] of application; it is quite another matter to emasculate the section of any meaningful limit.[26] Although this Court has never been confronted with the right facts justifying § 5's limitation, such does not indicate that the provision is without boundary. Arguably, this Court has never had the occasion to comment upon legislation, like the 1979 Russell County enactments, which have such a *de minimis* (if any) impact on voting rights. Certainly, this Court has described the breadth of § 5 in sweeping terms; however, these descriptions of § 5 must be interpreted in the context of the facts before the Court. In each case, the Court was addressing legislation that had a clear and undeniable impact on minority voting strength. For instance, the opinions in *Katzenbach*, *Allen* and *Perkins* arose out of patent attempts by a political subdivision to dilute minority voting strength: voter registration tests

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[25] *Allen v. State Board of Elections*, 393 U.S. at 565.

[26] *See Perkins v. Matthews*, 400 U.S. at 398 (J. Harlan concurring in part and dissenting in part).

and devices,[27] shifts from district to at-large representation,[28] and annexations.[29] Admittedly, *Hadnott*[30] and *Dougherty County*[31] took this Court's interpretation of § 5 one step further when it applied § 5 to legislation discouraging minority candidacy. Russell County's enactments present something totally new: a challenge to legislation which has no discernible impact on minority voting practices, procedures or patterns. The idea that these changes, like the ones in *Dougherty*, "reduce[d] in some manner the autonomy or political potency of . . . the county commissioners in Russell . . . Count[y]" is plainly inconsistent with an appreciation of the facts in this case, as found by the three judge panel. *See* JS A-15 at n.14.

The most relevant indication of the intent of the 89th Congress in drafting this legislation, the text itself, plainly places the emphasis on *voting* qualifications, prerequisites, and *voting* standards, practices or procedures. *See* 42 U.S.C § 1973. The phrase "any voting standard, practice, or procedure with respect to voting" must be interpreted in this light. *See* 42 U.S.C. § 1973c. The phrase "with respect to voting" only has meaning within the context of *voting* qualifications, prerequisites, standards, practices or procedures. The farther one gets away from

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[27] *South Carolina v. Katzenbach*, 383 U.S. 301, 329-30 (1966). This case was a bill in equity which challenged the constitutionality of the Voting Rights Act in its entirety.

[28] *Allen*, 393 U.S. at 569.

[29] *Perkins v. Matthews*, 400 U.S. at 387, 388.

[30] *Hadnott*, 394 U.S. 358, 362-365.

[31] *Dougherty County v. Board of Education*, 439 U.S. 32, 37.

the items listed in § 1973, the more tenuous is the application of § 1973c,[32] even though there is some, broadly defined impact upon voting. To give the phrase "with respect to voting" any other meaning is to presume the 89th Congress intended the absurd[33] – the Voting Rights Act would apply to *every* local law, ordinance, or regulation virtually without exception, because it had an "impact" on minority voting strength.

Appellee's reading of § 1973c, in light of § 1973, is equally supported by sources of legislative intent outside the text. Attorney General Katzenbach, who is widely recognized to have played a large role in the drafting and passage of the Voting Rights Act, stressed that the "bill

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[32] The rule of construction, *Ejusdem generis*, is applicable here. *Black's Law Dictionary* defines *Ejusdem generis* as:

> Of the same kind, class, or nature. In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind of class as those specifically mentioned . . . .

[33] Attributing to Congress such a presumption is in direct contravention of normal rules of statutory construction. *See* 82 *C.J.S. Statutes*, § 316 (1953).

really is aimed at getting people registered. . . . "[34] 1965 House hearings 21, cited in *Hardy v. Wallace*, 603 F.Supp. 174, 182 (J. Propst concurring). Senator Jacob Javits, one of the principal sponsors of the Voting Rights Act, explained that § 5's purpose was to prevent states from substituting new methods of voting qualifications and procedures for proscribed tests and devices suspended by § 4.[35] Another principle advocate, Senator Tydings, on the same day, explained that the suspension of voting tests and appointment of Federal examiners were "the heart of the bill."[36]

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[34] Assistant Attorney General Burke Marshall concurred. In House hearings, he answered a congressman's question by stating, "the problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill." Hearings on H.R. 6400 before subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., first session, page 74.

[35] Senator Javits commented that,

> Section 5 deals with attempts by States or political subdivisions whose tests or devices have been suspended under Section 4 to alter voting qualifications and procedures which were in effect on November 1, 1964. Section 5 permits a State or political subdivision to enforce new requirements only if it submits the new requirements to the Attorney General and the Attorney General does interpose objections within sixty days thereafter.

111 Cong. Rec. 8363 (daily ed. April 23, 1965).

[36] 111 Cong. Rec. 8366 (daily ed. April 23, 1965).

It was not the intent of Congress to intrude upon local legislative processes far removed from any colorable impact upon voting rights. Bill proponent Senator Javits protested that the act was "not introduced to federalize the voting process, but to aid the disenfranchised American to exercise the franchise." *Id.* at 8363. When Congress extended application of the Voting Rights Act in 1982, the official Senate report stated that Congress had originally intended for the act to "cover voting rights while allowing the legitimate processes of government to go on."[37]

Therefore, this Court should, while maintaining § 5's broad application to *voting* practices, reject the Appellants' all encompassing interpretation of § 5 which provides no reasonable limit to its coverage. Affirmation of the lower court's ruling is proper, if for no other reason, because, "[t]he language of section 5 clearly provides that it applies only to proposed changes in voting procedures." *Beer v. United States*, 425 U.S. 130, 138 (1976).

D. Russell County's 1979 enactments not only lack a "potential for discrimination" as found by the three-judge panel; in reality, the conversion to the unitary road system actually brings the most benefit to Russell County's black constituents.

While a three-judge panel may, in the abstract, opine that the motive behind and the actual effect of a challenged enactment are "irrelevanc[ies]", *Turner v. Webster*, 637 F.Supp. 1089, 1092 (N.D. Ala. 1986) (three-judge

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[37] S. Rep. No. 417, 97th Congress, Second Session (1982) at 8.

court), this Court has said that Section 5's main concern is "the reality of changed practices as they affect Negro voters." *See Georgia v. United States*, 411 U.S. 526, 531 (1973). In other words, though the judiciary's responsibility in determining § 5 coverage is to focus upon the "potential for discrimination" and not the substantive aspects of the Voting Rights Act; in assessing the "potential for discrimination", it is necessary to have an appreciation of the facts surrounding Russell County's 1979 enactments.

The "reality" behind Russell County's 1979 "changed practices" is simple: the people of Russell County made a decision that the unitary road maintenance system was superior to the district system of road management. The district system had generated duplication and waste, lacked accountability and invited corruption. As a direct response to the indictment of a county commission for abuse of his office, the choice for the unitary system was made – all this nearly seven years *before* a black candidate was elected to the Russell County Commission. Governmental integrity benefits black constituents as well as white. The Appellants have strained to implicate some sort of racial animus in a situation where it just does not exist.

Further, Appellants Mack and Gosha apparently do not have a problem with the unitary system as much as they want "discretionary funds" to spend in their districts.[38] Both Mack and Gosha voted in favor of the road budgets.[39] Their common complaint is that they do not

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[38] *See* A-18, Deposition of Nathaniel Gosha, pages 35, 36, 82, 84 and *see* A-21, Deposition of Jerome Gray, page 21. Jerome Gray is the Field Director for the Alabama Democratic Conference, the black caucus of the Alabama Democratic Party.

[39] *See* A-18, Deposition of Nathaniel Gosha, page 17 and A-20, Deposition of Ed Mack, page 17.

have an "equal share" of revenue to spend in their districts. Such political dilemmas – so completely devoid of racial overtones – are not the "stuff" of which Voting Rights Act challenges are made.

Finally, it is interesting to note that the plan advocated by Appellants to divide road funds equally between the districts, regardless of need, would actually be less beneficial to most black Russell County constituents. District 7, one of the more heavily populated rural districts and containing almost 60% of the county's roads[40], is predominantly black though their chosen representative Commissioner Allen is white. Thus, Appellants' plan to equally divide road resources regardless of need would actually take away resources from this majority black district.

E. The three-judge panel, while according the deference due to the Justice Department's position, properly and prudently chose to override the Justice Department's position and rule in the favor of the Russell County Commission.

Certainly, the position of the Justice Department is to be accorded considerable deference due to the major role it played in the drafting of § 5; yet, its view is not dispositively binding upon a three-judge court's determination of § 5 coverage cases. *Lucas v. Townsend*, 698 F.Supp. 909, 911 (M.D. Ga. 1988). It is not rare for a court, after carefully considering the Department's position, to

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[40] District 5, represented by Appellant Mack, has 13.8% of the county roads. District 4, represented by Appellant Gosha, has only 1.3 miles of county roads within its borders. *See* breakdown of road mileage by district in A-11.

reject the Department's leading and make what it views to be the most accurate application of § 5. *See*, e.g., *Hardy v. Wallace*, 603 F.Supp. 174, 177, n.5 and 181-182.

The instant three-judge panel carefully weighed the Attorney General's opinion but because the department's position on the matter had not been settled enough even to promulgate new regulations for guidance in this area, the court felt justified to make an independent judgment of the issues presented. JS A-15.

CONCLUSION

Based upon the foregoing, Appellee request that this court affirm the lower court's holding which found the Appellee Russell County Commission exempt from the preclearance requirements of § 5 of the Voting Rights Act of 1965.

Respectfully submitted,

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